Michael K. Jeanes, Clerk of Court
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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2011-000317-001 DT 09/01/2011

THE HON. CRANE MCCLENNEN

CLERK OF THE COURT
H. Beal
Deputy

STATE OF ARIZONA GARY L SHUPE

v.

DASHA TKACHENKO (001) SIMONE ANNE ATKINSON

PHX MUNICIPAL CT
REMAND DESK-LCA-CCC

RECORD APPEAL RULING / REMAND

Lower Court Case Number 14053096.

Defendant-Appellant Daria Tkachenko (Defendant) was convicted in Phoenix Municipal Court of driving under the influence. Defendant contends the State did not establish *corpus delicti* that was sufficient to allow for the admission of her statement. For the following reasons, this Court affirms the judgment and sentence imposed.

I. FACTUAL BACKGROUND.

On March 28, 2010, Defendant was cited for driving under the influence, A.R.S. § 28–1381(A)(1) & (A)(2); driving under the extreme influence, A.R.S. § 28–1382(A)(1); leaving the scene of an accident, A.R.S. § 28–665(A)(1); failure to provide identification, A.R.S. § 28–1595(B); and failure to control speed to avoid a collision, A.R.S. § 28–701(A). Prior to trial, Defendant submitted a Trial Memorandum contending there was no evidence other than Defendant's statement showing she was driving the vehicle.

At the hearing on the *corpus delicti* issue, Officer Justine LaClere testified the Phoenix Police Department received a 9-1-1 call at 2:30 a.m. on March 28, 2010, of a vehicle collision at 14602 North 19th Avenue, and that he responded to the scene at 2:33 a.m. (R.T. of Jan. 3, 2011, at 4, 25.) Upon arrival, he saw a black BMW that had been going north on 19th Avenue and had attempted to turn into a private driveway, but had skidded off the roadway and had gone over the sidewalk and over a grass area, and had collided with a block/wrought iron fence approximately 15 to 20 feet from the roadway. (*Id*. at 5.) The vehicle had hit the wall with sufficient force that it bent the right front wheel so it was horizontal to the ground rather than vertical to it. (*Id*. at 5–6.) The vehicle was unlocked and unoccupied, and was still warm as if it had just recently been driven. (*Id*. at 6.)

Officer LaClere searched the vehicle and found in it a credit card with the name "Daria Tkachenko." (R.T. of Jan. 3, 2011, at 7, 28.) He later learned from Defendant this was her card and the reason for the different names was a problem with the person originally doing the translation. (*Id*.) He checked prior reports, and found there was a report of a burglary from that vehicle about a month prior, and that report gave the address of 14602 North 19th Avenue and a specific apartment number. (*Id*. at 7, 11–12.) The vehicle was registered to Defendant's father, who lived at a totally different address than did Defendant. (*Id*. at 11, 27–28.) Officer LaClere went to the listed apartment and found Defendant in that apartment. (*Id*. at 7.) When Defendant came out, she was visually shaken and crying. (*Id*. at 8, 22.) Officer LaClere observed Defendant had bloodshot, watery eyes, and he could smell a moderate odor of alcohol coming from her. (*Id*. at 9.) When Officer LaClere asked Defendant what happened, she said she had been driving the vehicle and caused the collision. (*Id*. at 10, 19–21.) She also admitted she had been drinking beer with some friends. (*Id*. at 12–13, 21.) Officer LaClere had Defendant perform some field sobriety tests, and the results of those tests indicated Defendant was impaired. (*Id* .at 14–17.) He also administered a preliminary breath test, which showed Defendant had a BAC of 0.154. (*Id*. at 17.) Officer LaClere then placed Defendant under arrest for DUI and hit and run. (*Id*.)

At the conclusion of the testimony and arguments, the trial court found the State had presented enough evidence to show a reasonable inference Defendant was driving. (R.T. of Jan. 3, 2011, at 38.) The trial court identified the following factors: (1) The vehicle was registered to Defendant's father; (2) Defendant's credit card was found in the vehicle; (3) the vehicle was found in front of Defendant's apartment complex; (4) Defendant was present in her apartment; (5) Defendant was visibility shaken and crying; (6) Defendant had watery, bloodshot eyes; and (7) a moderate odor of alcohol was coming from her. (*Id*. at 38–39.)

Defendant subsequently submitted the matter on the record. (R.T. of Jan. 4, 2011, at 3.) That included the Phoenix Police Department Alcohol Influence Report. (Exhibit #1.) Included in that Report is Officer LaClere's statement that, as he was heading toward Defendant's apartment, he spoke to a man named Oley, who identified himself as Defendant's boyfriend, and who said Defendant had been driving the vehicle and was "in the apartment crying because she got into the accident." (Alcohol Influence Report at 3; *see also* R.T. of Jan. 3, 2011, at 10, 11.) The record also contained the Phoenix Police Department Report on the Examination of Physical Evidence stating Defendant had a BAC of 0.111. The State dismissed the § 28–1382(A)(1) charge, and the trial court found Defendant guilty of the § 28–1381(A)(1) & (A)(2) charges and the § 28–665(A)(1) charge, and not guilty of the § 28–1595(B) and§ 28–701(A) charges. (R.T. of Jan. 4, 2011, at 4, 13.) The trial court then imposed sentence. (*Id*. at 14–15.) On that same day, Defendant filed a timely notice of appeal. This Court has jurisdiction pursuant to ARIZONA CONSTITUTION Art. 6, § 16, and A.R.S. § 12–124(A).

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II. ISSUE: DID THE STATE PRESENT SUFFICIENT EVIDENCE TO ESTABLISH *CORPUS DELICTI*

Defendant contends her statements about her driving the vehicle should have been excluded because the State failed to establish *corpus delicti*. An appellate court reviews a ruling on the sufficiency of the evidence of *corpus delicti* for abuse of discretion. *State v. Chappell*, 225 Ariz. 229, 236 P.3d 1176, ¶ 8 (2010); *State v. Morris*, 215 Ariz. 324, 160 P.3d 203, ¶ 33 (2007). "The corpus delicti doctrine ensures that a defendant's conviction is not based upon an uncorroborated confession or incriminating statement." *Chappell* at ¶ 9, *quoting Morris* at ¶ 34. Rather, the state must present sufficient evidence to permit a "reasonable inference" that the "alleged injury to the victim . . . was caused by criminal conduct rather than by suicide or accident." *Chappell* at ¶ 9, *quoting Morris* at ¶ 34, *quoting State v. Hall*, 204 Ariz. 442, 65 P.3d 90, ¶ 43 (2003); *see also State v. Gillies*, 135 Ariz. 500, 506, 662 P.2d 1007, 1013 (1983). *Corpus delicti* may be established through circumstantial evidence. *Morris* at ¶ 34.

In the present case, evidence that the vehicle had skidded off the road and collided with a wall showed someone had been driving it. Evidence that Defendant had bloodshot, watery eyes and smelled of alcohol, together with the results of the field sobriety tests showed Defendant had been drinking alcohol and was impaired. Thus, the only other element the State had to prove was that Defendant was the one who had been driving the vehicle. The evidence presented was that the vehicle was still warm, which would permit a "reasonable inference" that the vehicle had been recently driven. The vehicle was registered to Defendant's father, who lived at a different address, which would permit a "reasonable inference" that Defendant's father was not the one who drove the vehicle. Defendant's credit card was found in the vehicle, the vehicle was found in front of Defendant's apartment complex, Defendant was present in her apartment, and Defendant was visibly shaken and crying, which would permit a "reasonable inference" that Defendant was the one who drove the vehicle and caused the damage to it. This Court therefore concludes the trial court did not abuse its discretion in determining the evidence was sufficient to establish *corpus delicti.*

Defendant contends the State must show the act in question is a criminal act. In the present case, as noted above, evidence separate and apart from Defendant's statement showed (1) someone drove the vehicle and (2) Defendant was impaired. Thus by showing Defendant was the one who drove the vehicle, the State established a criminal act of driving under the influence.

Defendant cites *State v. Fair,* 23 Ariz. App. 264, 532 P.2d 536 (1975), for support. That case does not lend support for two reasons. First, it was not a *corpus delicti* case because the defendant there never made any statement. Second, the issue was whether there was sufficient evidence to show the defendant guilty of the offense, which required proof beyond a reasonable doubt, while the standard for *corpus delicti* is a "reasonable inference" of an act, which is a much lower standard.

Defendant and the State each cite cases from other jurisdictions. This Court finds the Indiana and Oregon cases cited by the State to be persuasive, and finds the Florida case cited by Defendant to be distinguishable and of questionable continuing validity.

III. CONCLUSION.

Based on the foregoing, this Court concludes the trial court did not abuse its discretion in determining the evidence was sufficient to establish *corpus delicti*.

IN IT IS THEREFORE ORDERED affirming the judgment and sentence of the Phoenix Municipal Court.

IN IT IS FURTHER ORDERED remanding this matter to the Phoenix Municipal Court for all further appropriate proceedings.

IN IT IS FURTHER ORDERED signing this minute entry as a formal Order of the Court.

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THE HON. CRANE MCCLENNEN
JUDGE OF THE SUPERIOR COURT 090120111620